

In the Matter of CITY OF BOSTON  
 and  
 BOSTON POLICE PATROLMEN'S ASSOCIATION  
 Case Nos. MUP-2749, MUP-01-2892

54.31 *impact of management rights decisions*  
 54.589 *bargaining unit work*  
 67.14 *management rights*

June 24, 2005  
 Allan W. Drachman, Chairman  
 Hugh L. Reilly, Commissioner

David M. Connelly, Esq. *Representing the City of Boston*  
 Nicholas Anastasopoulos, Esq.

Leigh A. Panettiere, Esq. *Representing the Boston Police*  
 Bryan C. Decker, Esq. *Patrolmen's Association*

**DECISION<sup>1</sup>**

Statement of the Case

The Boston Police Patrolmen's Association (Union) filed charges of prohibited practice with the Labor Relations Commission (Commission) on July 21, 2000 and January 16, 2001, alleging that the City of Boston (City) had violated Sections 10(a)(1) and (5) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's rules, the Commission investigated the Union's charges and, finding probable cause to believe that a violation had occurred, issued complaints and notices of hearing on May 11, 2001 and on September 6, 2001.

The Commission's May 11, 2001 complaint in Case No. MUP-2749 alleges that, between March 25, 2000 and March 30, 2000, the City decided to assign crowd and riot control duties to non-bargaining unit personnel without providing the Union with prior notice and an opportunity to bargain to resolution or impasse about that decision and its impacts in violation of Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Commission's September 6, 2001 complaint in Case No. MUP-01-2892 alleges that, on or about October 3, 2000 and January 9, 2001, the City decided to assign crowd and riot control duty to non-bargaining unit personnel without providing the Union with prior notice and an opportunity to bargain to resolution or impasse over that decision

and its impacts in violation of Sections 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. In its answer to the Commission's September 6, 2001 complaint, the City, in part, states that by letter dated October 18, 2000, the City provided the Union with notice and an opportunity to bargain over future deployment of a special tactical unit.

By letter dated February 19, 2002, the Commission notified the parties that it was considering deferral to an arbitrator's award (Award) dated December 17, 2001. The Commission provided the parties with an opportunity to show cause why it should or should not defer to the Award. In response to the Commission's notice, the Union opposed deferral because the City had filed an action in Superior Court to vacate the Award. The City opposed deferral because the Award did not address the issues presented in these cases.

By letter dated April 11, 2002, the Commission notified the parties that the Commission had decided not to defer the issues to arbitration, but to consolidate the two cases for hearing and decision. On June 4, 2002, June 6, 2002, June 7, 2002, June 13, 2002, October 1, 2002, October 10, 2002, November 26, 2002, and January 14, 2003, Ann T. Moriarty, Esq., a duly-designated Commission hearing officer (Hearing Officer), conducted the hearing in the cases. Both parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.<sup>2</sup>

On June 6, 2002, the Union filed a Motion in Limine to Exclude Evidence of Settlement Negotiations in the form of letters exchanged by the parties between October 18, 2000 and January 18, 2001 and discussions between counsel for the parties about those letters. On June 12, 2002, the City filed its Opposition to the Union's motion, and on June 20, 2002, the Union filed a Reply to the City's Response to its Motion in Limine. On October 8, 2002, the Hearing Officer issued a ruling denying the Union's Motion in Limine.

On January 14, 2003, just prior to the closing of the hearing, the Union moved to strike the testimony of David Connelly, Esq. (Connelly) and Leigh Panettiere, Esq. (Panettiere) from the record *nunc pro tunc* on the grounds that their testimony constituted evidence of settlement discussions and, therefore, is inadmissible. The City objected to the Union's Motion to Strike arguing that the testimony of both counsel does not constitute evidence of settlement discussions, but rather constitutes offers to bargain and responses to those offers. On March 18, 2003, the Hearing Officer issued a Post-Hearing Ruling denying the Union's Motion to Strike Certain Testimony and Other Evidence.<sup>3</sup> The Commission received both parties' briefs on June 27, 2003.

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission shall issue a decision in the first instance.

2. The parties jointly prepared a transcript of the hearing by transcribing the cassette tapes. Further, the parties agreed that each party may refer to the prepared transcript in their briefs. The parties have provided the Commission with a copy of that transcript. The parties did not request that the Commission adopt the transcript as the official record at this time. Rather, the parties reserved their right to request that the prepared transcript become the official record, should either party appeal the Commission's decision to the Appeals Court.

3. The Union maintains its objection to the consideration of this evidence for the same reasons it moved to exclude the evidence from the hearing. In light of our decision, it is unnecessary for us to consider whether the Union had waived by inaction its right to bargain over the decision to transfer bargaining unit work and the impacts of that decision. Therefore, because the evidence in controversy is not material to the outcome of the case, we have modified the Hearing Officer's Recommended Findings of Fact to exclude this evidence.

On July 8, 2004, the City forwarded certain documents to the Hearing Officer related to post-hearing actions concerning the Award. The documents were accompanied by a cover letter stating that the documents were provided for the Hearing Officer's review. The City did not file a motion or a request to reopen the hearing to receive further evidence to which the Union could respond. See, 456 CMR 13.07, 456 CMR 13.14. Because these documents are not part of the hearing record, the Hearing Officer declined to make any findings of fact about their content. The Commission takes administrative notice of the Superior Court decision vacating the Award.

On May 2, 2005, the Hearing Officer issued Recommended Findings of Fact. On May 20, 2005, the City and the Union filed challenges to the Recommended Findings of Fact, and the City filed a Motion to Dismiss. On May 31, 2005, the Union filed its opposition to the City's Motion to Dismiss and its written response to the City's challenges to the Recommended Findings of Fact. The City did not file a written response to the Union's challenges to the Recommended Findings of Fact.

#### Findings of Fact<sup>4</sup>

The City and the Union challenged portions of the Hearing Officer's Recommended Findings of Fact. After reviewing those challenges and the record, we adopt the Hearing Officer's Recommended Findings of Fact, as modified where noted, and summarize the relevant portions below.

The Union is the exclusive collective bargaining representative for a bargaining unit of about 1,500 uniformed police patrol officers employed by the City in its police department, excluding detectives. The City and the Union are parties to a collective bargaining agreement (Agreement) that continued in effect at all times material to the issues in this case. The Agreement contains the following provision:

#### *ARTICLE V MANAGEMENT RIGHTS*

Subject to this Agreement and applicable law, the City (and its Mayor and Police Commissioner) reserves and retains the regular and customary rights and prerogatives of municipal management.

Patrol officers and detectives hold the same civil service rank of patrol officer. Prior to April 20, 1982, the Union's bargaining unit also included all police department detectives below the rank of sergeant.

Chapter 679 of the Acts of 1981 amended Section 1 of the Law by adding the following language to the definition of professional employee:

Professional employee shall include a detective, member of a detective bureau or police officer who is primarily engaged in investigative work in any city or town police department which employs more than four hundred people.

On April 20, 1982, the Commission certified the Boston Police Detectives Benevolent Society (Society) as the exclusive representative of all detectives below the rank of sergeant.<sup>5</sup> In or about 2000, the City employed about 250 to 300 detectives below the rank of sergeant in its police department.

Before and after April 20, 1982 and continuing at all times material to the issues in this case, patrol officers and detectives have performed crowd control work, working the same event and performing the same duties, including occasionally dispersing a disorderly crowd that holds the potential for violence and handling crowds that have unexpectedly turned violent.<sup>6</sup> When performing these duties, the patrol officers and the detectives wear their standard police uniform and their standard duty belt, including a firearm and a baton. All police officers receive training in basic crowd control techniques at the Boston police academy after they are first hired as police officers. At that time, the police officers are issued riot helmets and batons. All police officers periodically are sent to additional training in crowd control.

#### *Tactical Police Force (TPF)*

Both patrol officers and detectives were members of the TPF that the police department created in the mid to late 1960s. The TPF was a stand-alone, anti-crime unit that had city-wide jurisdiction and also performed crowd and riot control duties where there was a likelihood of civil disorder, like dispersing disorderly crowds at anti-war demonstrations and protests on college campuses. The TPF was regularly assigned to all parades and festivals, and also performed crowd and riot control duties during the mid-1970s surrounding the implementation of the court order to desegregate the City's schools. Patrol officers and detectives assigned to the TPF received advanced training to respond to situations where there was the potential for civil disorder. This advanced training in riot control differed from the crowd control training that all police officers received. Patrol officers and detectives who were not assigned to the TPF did not receive advanced training in riot control.

When the TPF performed crowd and riot control duties, patrol officers and detectives performed the same duties, wore the same uniforms, and possessed and used the same crowd and riot control equipment. In the 1970s, the TPF numbered about 125 police patrol officers, with about six or seven detectives. The police department disbanded the TPF in or about the late 1970s or early 1980s, but before April 1982 when the Commission certified the Society as the exclusive representative of detectives below the rank of sergeant.

Between the time the police department disbanded the TPF and just prior to the Biotech Conference in late March 2000, the police department continued to assign both patrol officers and detectives to perform crowd management and control functions at parades, festivals, political demonstrations, and sporting events.<sup>7</sup> If the police department determined that the upcoming event would likely

4. The Commission's jurisdiction is uncontested.

5. The Commission takes administrative notice of Case No. MCR-3286, *City of Boston*.

6. Within the five years prior to March 2000, violence broke out at a festival where both patrol officers and detectives had been assigned to perform crowd control duties.

7. [See next page.]

attract large crowds that had the potential of turning an orderly event into a disorderly event, the police department supplemented those patrol officers and detectives exclusively with members of its specialty units, the Mobile Operations Patrol (MOP), the canine unit, and the mounted unit.<sup>8</sup> Those units were then either visibly present at the event or deployed to a nearby staging area available for full activation, if necessary, to isolate and disperse disruptive, disorderly crowds and restore order at the event.

#### *Patrol Officers Assigned to District Stations*

There are eleven district stations in the City. Patrol officers who are assigned to the district stations work in squads and generally work on a day-to-day basis with the same officers and same supervisor. For example, Officer Michael C. O'Hara (O'Hara) is regularly assigned to work at a district station, District 4, where there are three different squads. Based on O'Hara's experience, he has been assigned to the same squad for about thirteen years and has worked generally with the same patrol officers and sergeant, allowing for transfers and other normal changes in the identity of the squad personnel over that thirteen-year time period. Patrol officers, working in one-man patrol cars, respond to radio calls triggered by 911 calls and other emergencies within their assigned districts. Generally, patrol officers assigned to district stations perform public safety duties only within that assigned district.

Each district also has an Emergency Deployment Team (EDT) that includes patrol officers who are designated as team members on a rotating basis. Large districts assign a supervisor and three patrol officers to the EDT, whereas smaller districts assign a supervisor and two patrol officers to the EDT. If there is an emergency anywhere in the City, like a missing child, a crime scene, or a crowd control issue, each district sends its EDT to respond. The EDT is designed to supplement district personnel where the emergency occurs. The rationale behind the EDT is to have about thirty-five patrol officers respond to an emergency within a thirty to forty-five minute time period. EDT members have the necessary equipment with them to respond to an emergency call. Certain district EDT teams respond with prisoner transport wagons. Detectives do not respond as part of an EDT team.

As stated previously, patrol officers are trained in crowd control techniques as part of their police academy training and during periodic in-service training sessions. These district station patrol officers are deployed to an event to perform crowd control duties. When they arrive at their assigned post, like along the route of the Boston Marathon or a parade, they are placed in squads with a supervisor. These squads, which are formed at the event, do not include the same police officers and supervisor with whom they work on a day-to-day basis at the district stations.

During the month before the Biotech Conference in March 2000, the police department conducted crowd and riot control training sessions for patrol officers assigned to the department's district stations. During this training, the department issued these patrol officers new, updated helmets.

#### *MOP Unit*

Police patrol officers who are assigned to the MOP unit receive basic training in the operation of a motorcycle. In addition, these patrol officers are trained in crowd control and entry and apprehension techniques. Their day-to-day uniform consists of boots, britches, and a uniform shirt. They also are issued battle dress uniforms that they wear when they perform crowd control duties and work as members of an entry and apprehension team. The MOP unit has performed crowd control functions at various parades, leading the parade in a wedge formation to maintain the width of the parade route. Further, the MOP unit has performed crowd control functions at major concerts and sporting events. The police department assigned the MOP unit to an event if it determined that a supplemental force was necessary to prevent and, if necessary, to provide riot control.<sup>9</sup> In 2000, the police department had about forty-three patrol officers assigned to MOP.

During a couple of years in the late 1990s, the MOP unit attended training sessions in crowd control duties about once a month. At other times, the training schedule has been less frequent, with training generally occurring just prior to an event where their services may be needed. The police department trained the MOP unit on a couple of occasions during the month just prior to the Biotech Conference scheduled for late March 2000.

The MOP unit is broken down into squads, with each squad having six or seven patrol officers and one supervisor. The MOP unit does not include detectives. Each squad, including the same supervisor who is attached to that squad, work the same scheduled days.<sup>10</sup> The officers do not take radio calls.

#### *Canine Unit*

Police patrol officers assigned to the canine unit are designated as canine handlers and participate in a three-month training course during which time they are assigned a canine. The police officer/canine handler and the assigned canine are trained and prepared to perform crowd and riot control functions. The police officer/canine handler assists in search and rescue operations throughout the City. Their standard uniform consists of boots and battle dress uniforms. The canine unit does not include detectives. In 2000, the police department had about twelve police officers/canine handlers assigned to the canine unit.

7. Patrol officers and detectives share the same overtime list for crowd management and control functions. The Commission modifies the Hearing Officer's Recommended Findings of Fact to include this footnote.

8. The Commission has modified the Hearing Officer's Recommended Findings of Fact, as requested by the Union. Captain Robert P. Dunford (Dunford), who commanded the City's police training academy for a number of years and directed and coordinated the training of all officers in preparation for the Biotech Conference in 2000, testified credibly that there are three types of crowd control: 1) crowd man-

agement, like directing traffic; 2) crowd control, like the activity associated with a labor strike, which is essentially peaceful but has the potential for some type of disturbance; and, 3) riot control that results in destruction of property and injuries to persons.

9. The Commission has modified the Hearing Officer's Recommended Findings to include this fact.

10. The overtime assignments may result in different officers in a squad.

*Mounted Unit*

Police patrol officers who are assigned to the mounted unit are trained in crowd control techniques using various formations with their horses. Their standard uniform consists of riding pants, boots, and a uniform shirt. For crowd control, the officers wear helmets and batons. The mounted unit has performed crowd control functions at the hemp fest on Boston Common, the baseball all-star game, and the 1999 Red Sox playoff series. Just prior to the Biotech Conference, the police department conducted trainings sessions for the mounted unit and issued the patrol officers gas masks. The mounted unit does not include detectives. In 2000, the police department had about thirteen officers assigned to the mounted unit.

*Youth Violence Strike Force (YVSF)*

The YVSF is a unit within the department's Bureau of Special Operations. Its mission is to identify and disrupt gang activity and to educate youth on the perils of joining a gang.<sup>11</sup> The unit consists of patrol officers who are members of the Union's bargaining unit, detectives who are members of the Society, and supervisors. About fifty police officers, including patrol officers, detectives, and supervisors, are assigned to the YVSF working in squads on a daily basis. Generally, officers in the same squad have the same days off and report regularly to the same sergeant. The YVSF has city-wide jurisdiction and, therefore, their investigations take them across district station lines. The officers do not take radio calls.

Patrol officers and detectives who are assigned to this unit each attend a two-week, in-service training session at the police academy. They are trained in various police techniques, like soft entries, to enter dwellings. The officers are also trained to conduct Board of Probation checks.

Members of the YVSF, both police patrol officers and detectives, provide crowd control for parades. While performing these duties, the officers would be in their standard, authorized police department uniform. Crowd control functions at a parade include ensuring that persons do not interfere with the parade.

In the month prior to the Biotech Conference, the police department conducted riot control training for all members of the YVSF, including patrol officers and detectives. During this training, the department divided the YVSF into five squads, with the sergeant designated as the squad leader. The department issued helmets, riot shields, gas masks, shin pads, special leather gloves, and battle dress uniforms to these officers. After the Biotech Conference, the police department conducted more training sessions for the patrol officers and detectives in the YVSF. During these sessions, which the department conducted monthly, the instructor reviewed the basic riot control techniques, like how to extract injured persons from a crowd, formations, and how to handcuff and take prisoners out of a situation.

*Drug Control Unit (DCU)*

In early 2000, the DCU totaled just under 100 uniformed police personnel, about fifty-five patrol officers who are included in the Union's bargaining unit, about twenty detectives who are included in the Society's bargaining unit, and superior officers. Police officers assigned to the DCU do not respond to radio calls. These police officers receive specialized training in narcotics investigations and undercover operations. While performing their duties, members of the DCU are assigned to squads, including patrol officers, detectives and a supervisor, with whom they work regularly on a day-to-day basis. Although members of the DCU are assigned to divisions, if an investigation leads them across division lines, they cross those lines to conclude their investigation.

By memorandum dated March 3, 2000, Deputy Superintendent Patrick J. Crossen (Crossen), Commanding Officer of the DCU, notified all DCU personnel of the scheduled, mandatory riot training on March 10 (riot control tactics and arrest tactics), March 13 (issued gas masks and trained in the use of chemical munitions and the use of gas masks), and March 14, 2000 (advanced riot control tactics). Crossen's memorandum also notified the DCU personnel that: 1) they would be training with the AGVU and MOP and would be used as tactical teams and arrest teams during the Biotech Conference; 2) they would be issued protective equipment at the training; and, 3) no days off would be granted during the Biotech Conference. Officer John Broderick (Broderick), a member of the Union's bargaining unit assigned to the DCU and the Union's representative in the DCU, received a copy of this March 3, 2000 memorandum on or about the date it issued. The police department conducted this training as scheduled. Further, the department conducted two additional days of mandatory training for DCU personnel on March 22 and March 23, 2000.

During this training, department personnel told Broderick that they would be activated only at the point when the police officers on the scene were not able to control the situation. If that occurred, the DCU would be deployed and activated. Emergency medical service (EMS) personnel trained with the DCU members in techniques to remove injured persons from hostile crowds. Certain DCU squads were trained as arrest teams to get into hostile crowds, identify a targeted person, arrest them, and remove them from the crowd.

Over the course of his career with the police department, Broderick has performed crowd control duties on various occasions including parades, festivals, and the Boston Marathon. While performing crowd control, Broderick was dressed in his standard uniform, with his regular firearm belt and standard baton. Further, while performing crowd control duties, Broderick took orders from any officer superior in rank to him, and he was generally stationed about twenty yards from the next officer who was also at the event performing crowd control duties. In contrast, during riot control training, Broderick was directed to take all orders

11. Officer Thomas Pratt (Pratt) is a member of the Union's bargaining unit and was assigned to the YVSF at all times material to the issues in this case. Pratt holds the office of district representative with the Union and testified during the hearing.

from the sergeant in charge of his specific squad and, if activated, to stand shoulder to shoulder or no more than at arm's length from a fellow police officer. Further, if activated to quell a riot, Broderick would be in battle dress uniform and armed with full riot gear.

The DCU, including patrol officers and detectives, trained in riot helmets and battle dress uniforms. The police department issued battle dress uniforms, jump boots, protective chest armor, leg pads, arm pads, gloves, riot shields, and gas masks to all members of the DCU and trained them in the use of this equipment. After the Biotech Conference, the police department continued to train DCU personnel in riot control techniques.

By memorandum dated September 22, 2000, Crossen notified all DCU personnel of mandatory crowd control training on September 27, 2000. Crossen further notified the officers to bring with them their issued helmets, sticks, and battle dress uniforms and stated that the unit was attempting to get battle dress uniforms for the new members of DCU "who were not with us during Bio-Tech."

*Special Tactical Force (STF) - Pre-Biotech Conference - Early 2000*

In or about late 1999, the police department became aware that the City would host a six-day biotechnology conference in late March 2000. In response to that information, the police department assigned Captain Detective Edward McNelley (McNelley) of the Bureau of Field Services and others to draw up an operational plan for the Biotech Conference.

In early February 2000, during the public safety planning for that conference, the police department received intelligence reports that persons would attend that conference for the discrete purpose of engaging in large demonstrations that could potentially disrupt public safety. Those intelligence reports indicated that the demonstrations had the potential of leading to riots and violence similar to those that occurred during a meeting of the World Trade Organization held in Seattle, WA in December 1999. After reviewing those reports and interacting directly with certain Seattle, WA public safety personnel, the City trained 1,500 officers in basic crowd control techniques. Based on McNelley's thirty years of experience with the City's police department, this was the first large scale event with the high likelihood of civil disobedience potentially resulting in riots since the anti-war protests and other demonstrations in the mid-1960s to the mid-1970s.<sup>12</sup>

In or about early February 2000, Police Commissioner Paul Evans (Evans) decided to create a tactical force and to include the YVSF and the DCU in the tactical unit. In Evans' opinion, the existing command and operational structure of these two units could be

easily translated into a tactical force. Further, because the YVSF and DCU do not have primary patrol functions, the City could temporarily re-direct the functions of those units to perform crowd and riot control. In reaching this decision, Evans elected not to take police officers from the district stations because he did not want to strip those stations of the first responder police officers, whose services continued to be needed during the conference to respond to other emergencies and 911 calls.

The STF, as constituted in early 2000, included the YVSF and the DCU. As described in part above, the City trained this unit of about 200 police personnel in advanced crowd and riot control techniques. The training for the STF was different than the training of all other officers, except for the officers in MOP, the mounted unit, and the canine unit.<sup>13</sup> For example, the STF training included very aggressive crowd dispersal techniques and work with the EMS personnel. The training also focused on the lines of communication within units to ensure effective communication when the officers are activated in a riot.

On February 25, 2000, Deputy Superintendent John Sullivan (Sullivan), Director of the Police Department's Office of Labor Relations, sent a memo to the Union inviting it to meet with him and representatives of other unions in the police department on February 28, 2000 to discuss any issues relative to the upcoming Biotech Conference. Union representatives, including Union President Thomas Nee (Nee), District Representative O'Hara,<sup>14</sup> and representatives of other unions in the police department, attended the February 28, 2000 meeting. During this meeting, the participants discussed the tactics that would be employed to insure the public safety and to insure that the City did not experience the same difficulties that Seattle had experienced. The Union raised the issue of safety equipment and indemnification.

During this February 28, 2000 meeting, the police department representatives also notified all the unions present, including the Union, that the City would establish and use a tactical group consisting of officers in the police department who were assigned to the YVSF, the DCU, the MOP unit, the canine unit and the mounted unit. The City did not specifically state that it would include the detectives in the YVSF and the DCU in this tactical group. Rather, the City stated that these two units would be included in the tactical unit. The City informed the union representatives, including Union representatives, that this tactical group would receive all the crowd control training that was to be given to all other department personnel and, in addition, this unit would receive additional training in mob control and tactical operations.

By letter dated March 3, 2000 to Evans and Sullivan, the Union informed them that it had learned that an organization was planning a

12. Similarly, Dunford, who is also a thirty-year veteran of the police department, testified credibly that the police department had not faced the potential of civil unrest associated with the Biotech Conference and the presidential debate since school busing in the mid-1970s.

13. The Commission has modified the Hearing Officer's Recommended Findings of Fact.

14. O'Hara has been employed by the City as a patrol officer since 1979. Since 1992, O'Hara has been a District Union Representative. At times material to the issues raised in this case, O'Hara was also a member of the Union's Executive Board and a member of several Union committees, including the grievance committee, the bargaining committee, the detail and overtime committee, and the by-laws committee. O'Hara personally observed the police department training of the STF at Franklin Park and the Victory Road Armory prior to the Biotech Conference. As a patrol officer regularly assigned to a district station, O'Hara attended crowd and riot control training during the time just prior to the Biotech Conference.

series of protest marches and demonstrations for each day of the Biotech Conference. Consequently, the Union requested that the police department train all officers who had not been recently trained in crowd and riot control techniques and the use of gas masks prior to March 24, 2000, the opening day of the conference. Further, the Union also: 1) requested equipment to protect officers during the anticipated demonstrations surrounding the conference; 2) sought assurances that the City would indemnify the police officers for any lawsuits which might arise out of the demonstrations; and, 3) requested that the police department provide psychological debriefing to officers following the demonstrations. Finally, the Union expressed its willingness to meet with department representatives to further discuss preparations for the conference.

The police department invited agents of the Union, members of the grievance committee and the health and safety committee, including O'Hara, to attend preparation meetings for the conference and to observe the training of the police officers who would be assigned to the event. On March 10, 2000, Union representatives, including O'Hara, met with police department representatives, including Sullivan, at the Victory Road Armory and again discussed issues related to the deployment of police officers during the Biotech Conference.

After that March 10, 2000 meeting, Nee, MacGillivray, and O'Hara observed the police department training members of the YVSF and the DCU, including patrol officers and detectives, among other units, in crowd and riot control techniques. This was the first time O'Hara had notice that the police department intended to use the detectives in these two specialty units to perform crowd and riot control duties during the Biotech Conference.<sup>15</sup> Immediately after observing that the police department had included detectives assigned to the YVSF and DCU in the training exercises, O'Hara spoke to Sullivan, who was also there observing the training. O'Hara protested the inclusion of detectives in this riot control work and stated that the work is performed only by members of the Union's bargaining unit. Sullivan did not order the detectives to cease from participating in the training. After this exchange with Sullivan, O'Hara knew that the City had included the detectives in the STF. O'Hara did not demand that the City bargain with the Union over this issue at this time or at any other time before the Biotech Conference.

The Union, as well as representatives of other unions who represented uniformed police personnel, and the City met again just two or three days prior to the opening of the Biotech Conference at the offices of the department's Bureau of Field Services. The Union representatives at that meeting included Nee, MacGillivray, and O'Hara. At some point during this meeting, the City gave the Union a copy of the police department's operational plan, as of that date, for the Biotech Conference.

*Biotech Conference - March 25, 2000 through March 30, 2000*

Patrol officers, who were regularly assigned to the district stations, were deployed to perform public safety duties both inside and in the area just outside the Hynes Convention Center, the site of the conference. Other bargaining unit members were available to perform work on an overtime basis during the days of the conference, but the department did not call them in to do so.

The patrol officers in the YVSF were deployed in full riot uniforms during the Biotech Conference, but they were not activated. The detectives in the YVSF were detailed to the police department's intelligence unit.<sup>16</sup> The patrol officers and the detectives in the DCU reported for duty with their full riot uniforms and newly-issued equipment on each day of the Biotech Conference, but they were held in readiness in locations away from the conference site. No squad of DCU members was either visible or activated to perform riot control duties during the conference.

Seven squads of the MOP unit were assigned to the Biotech Conference. Four of the seven squads were on their motorcycles. Other members of the MOP unit were assigned to a critical incident response team, or were part of a chemical munitions team or a sniper team during the Biotech Conference. These assignments did not include the use of a motorcycle. Although they reported to their staging area, they were not activated. During the six-day long conference, the police department brought in additional motorcycle officers from the district stations. These district motorcycle officers are not part of the MOP specialty unit.

The police department deployed certain officers in the canine unit to a staging area during the Biotech Conference, but they were not activated. The police department called in only those patrol officers in the canine unit who were regularly assigned to work the day schedule. The mounted unit also reported daily to the Biotech Conference. The mounted unit was on stand-by until the last day of the conference when the department activated the mounted unit to ensure orderly conduct.

*Presidential Debate - October 3, 2000*

About two weeks before October 3, 2000, the City was formally notified that a presidential debate would be held on October 3, 2000 at the University of Massachusetts, Boston campus. Because this site is state property, the Massachusetts state police had the primary responsibility of securing the site of the presidential debate. The police commissioner decided to assist the state police force during the event, including a strong City police presence at the debate site. After receiving intelligence that there would be large-scale demonstrations surrounding the debate, McNelley integrated the deployment of the STF into the police department's operational plan for this event. The police department notified Broderick that he was to perform duties at the presidential debate about one week prior to the scheduled debate date. O'Hara, the Union official who normally reviews event operation plans gener-

15. No other Union agent who had attended the same meetings and had observed the same training as O'Hara did testified in this case.

16. The intelligence unit gathers and disseminates information about activities throughout the City.

ally forwarded by the City to the Union in advance of the event, did not see this operational plan before the date of the debate.<sup>17</sup>

The police department deployed all members of the YVSF, including patrol officers and detectives, to a location near the site of the presidential debate. The police department activated the YVSF, which was dressed in riot control uniforms and armed with their riot control equipment, to disperse a crowd of over two hundred people who had tipped over the barriers and were throwing rocks and bottles.

The police department deployed all members of the DCU, including patrol officers and detectives, to a location near the site of the presidential debate. The police department activated the DCU unit, which was dressed in riot control uniforms and armed with their riot control equipment, to ensure that protestors remained behind the barriers.

Certain members of the MOP unit performed motorcycle escort functions for the candidates who participated in the debate.<sup>18</sup> Certain members of the canine unit reported to staging areas near the debate, but they were not activated. Certain members of the mounted unit were deployed to Park Square in Boston to ensure people stayed behind the barriers set up in the area of a hotel where one of the candidates was staying.

The City also assigned patrol officers to perform crowd control duties at the site of the debate. Other patrol officers, who are members of the Union's bargaining unit, were available to work at the presidential debate site on an overtime basis. The police department did not offer those patrol officers the opportunity to work this event on an overtime basis.

*Mayor's State of the City Address - January 9, 2001*

McNeeley prepared an operational plan for the Mayor's address. O'Hara, the Union official who normally reviews event operation plans generally forwarded by the City to the Union in advance of the event, did not see this operational plan before the Mayor's address. That plan did not initially include the use of the YVSF and DCU units of the STF. The MOP unit was always part of the operational plan to provide escorts for certain attendees and to assist with certain parking issues near the Dorothy Quincy Suite of the John Hancock Hall, the site of the address. However, based on intelligence received on the day of the scheduled address, the police commissioner contacted McNeeley and told him that he wanted additional resources at the site.<sup>19</sup>

The police department called in members of the YVSF, including patrol officers and detectives, to report to the location of the address in their standard uniforms. The YVSF unit stood alongside the barriers that had been placed at the site to prevent people from

crossing over the barriers. The YVSF unit there had their regular service duty belt on:

Late in the afternoon, the police department also called in certain members of the DCU, including patrol officers and detectives, to report to a location near the site of the Mayor's address in their standard uniforms. Supervisors ordered the DCU into formation and moved them to another location closer to the site, where they maintained readiness if needed.

Certain members of the MOP unit arrived at the site of the address in their regular uniforms, left their motorcycles in the area, and then escorted attendees through the crowd. The police department did not call in the canine unit for this address.

No police officer who worked at the site of the Mayor's address was dressed in battle dress uniforms or had riot shields with them. The police department deployed patrol officers assigned to district stations to perform crowd control duties on an overtime basis. Other patrol officers were available to work this event on an overtime basis. The police department did not offer those patrol officers the opportunity to work during this address on an overtime basis.

#### Opinion

The issue presented here is whether the City unlawfully transferred bargaining unit work to non-unit personnel when it assigned non-unit detectives to perform crowd control and riot control work during the Biotech conference, the presidential debate, and the Mayor's state of the City address without giving the Union prior notice and an opportunity to bargain to resolution or impasse over the decision to transfer the work and the impacts of that decision on mandatory subjects of bargaining.

The Union argues that since the late 1970s, when the City disbanded the TPF, the City has consistently assigned the specialty riot control work at issue here exclusively to its bargaining unit members in MOP. According to the Union, the City diverted from this twenty-year binding practice just prior to the Biotech conference when it unlawfully transferred a portion of the riot control work to non-unit detectives in the DCU and YVSF. The Union presses the distinction between crowd control work, which it acknowledges has been performed historically by both patrol officers and non-unit detectives, and riot control work, which has been performed exclusively by members of its bargaining unit since at least 1982. In the Union's view, the police department's reliance on MOP as its exclusive riot control force since its inception in the early 1980s only ended in 2000 because MOP's numbers had dwindled to a level that was insufficient to provide the riot control coverage necessary for the Biotech conference.

17. The police department prepares an operational plan for all City events, like parades, festivals, First Night, and Sail Boston.

18. Because one of the debate participants was then Vice President of the United States, the Secret Service mandates security protocol, like motorcycle escort deployment and counter sniper manpower. Therefore, in compliance with that protocol, the MOP was deployed in their primary function of escorting various motorcades surrounding the debate.

19. The demonstrations at the Mayor's address surrounded the labor negotiations between the City and the union that represented City firefighters. About 2:00 P.M. on the date of the Mayor's address, the police department obtained information that the labor negotiations had broken down.

In contrast, the City argues that the patrol officers and the detectives historically have shared crowd and riot control work. In the City's view, there is no practical distinction between crowd control work and riot control work. The TPF, a special unit created in the 1960s to perform crowd and riot control suppression, was comprised of both patrol officers and detectives performing the same duties. After the police department disbanded the TPF in the mid-1980s, the City continued to routinely and regularly assign detectives to crowd and riot control functions.

Generally, a public employer violates Section 10(a)(5) of the Law when it unilaterally transfers work performed by bargaining unit members to either an outside contractor or to other non-bargaining unit personnel without first giving its employees' exclusive collective bargaining representative notice and an opportunity to bargain to resolution or impasse. *City of Boston*, 26 MLC 144, 146 (2000), *aff'd sub nom. City of Boston v. Labor Relations Commission*, 58 Mass. App. Ct. 1102, *fur. rev. den.* 440 Mass. 1106 (2003); *Board of Regents of Higher Education*, 19 MLC 1485, 1487-1488 (1992), *citing City of Quincy*, 15 MLC 1239, 1240 (1988); *Town of Danvers*, 3 MLC 1559, 1576 (1977). To prove that an employer violated Section 10(a)(5) of the Law, the Union must establish that: 1) the employer transferred bargaining unit work to non-unit personnel; 2) the transfer of the work had an adverse impact on either individual bargaining unit members or on the bargaining unit itself; and, 3) the employer did not provide the exclusive bargaining representative with prior notice and an opportunity to bargain over the decision to transfer the work. *Commonwealth of Massachusetts*, 60 Mass. App. Ct. 831, 833 (2004); *Town of Bridgewater*, 25 MLC 103, 104 (1998) and cases cited. If bargaining unit work is not defined by the parties' collective bargaining agreement, the Commission examines the parties' customs and practices to determine whether certain jobs or functions have been treated by the parties as work performed exclusively by bargaining unit members. *Town of Watertown*, 8 MLC 1376, 1378 (1981).

The primary focus in determining what constitutes bargaining unit work is the nature of the functions that have been performed exclusively by the bargaining unit members. *Town of Norwell*, 13 MLC 1200, 1207-1208 (1986) (although call fire fighters and permanent fire fighters shared the work of responding to calls at night, permanent fire fighters exclusively staffed the fire station at night). Based on this record, we find that the work at issue is specialty riot control work, which bargaining unit members have performed exclusively since at least 1982. Although unit members and non-unit detectives shared riot control functions as members of the TPF for about fifteen years prior to the early 1980s, the record establishes that the City abandoned that practice after it disbanded the TPF. *See City of Boston*, 10 MLC 1539, 1542 (1984) (no pattern of police officers and detectives sharing auto investigation work during the time period most relevant to the decision).

Further, although the City continued to assign both unit members and non-unit detectives to perform crowd management and crowd control functions since at least 1982 through 2000, the evidence establishes a distinct line between crowd control functions and assignments and riot control functions and assignments. Indeed, the police department itself differentiates between crowd control

work and riot control work. Specifically, from the late 1970s or early 1980s until February 2000, the police department assigned both unit members and non-unit detectives to perform crowd management and crowd control functions at parades, festivals, political demonstrations, and sporting events. However, if the police department determined that an otherwise orderly event had the potential to turn into a disorderly event, the police department supplemented those patrol officers and detectives exclusively with members of its specialty units, MOP, the canine unit, and the mounted unit. The non-supervisory personnel in these specialty units are all members of the Union's bargaining unit. These specialty units were then either visibly present at the event or deployed to a nearby staging area available for full activation, if necessary, to isolate and disperse disruptive, disorderly crowds and restore order at the event. In early 2000, the City created the STF and trained and assigned non-unit detectives to perform riot control work that had been performed previously and exclusively by unit members. Therefore, the Union has established that the City transferred bargaining unit work to non-unit personnel.

The City next argues that, even if the Commission does not find that the work at issue is shared work, the complaint must be dismissed because the police commissioner has the contractual, statutory, and inherent management right to assign and deploy police personnel as the public safety requires. In the City's view, not only does the police commissioner enjoy the general grant of inherent authority by virtue of his position as head of a police force and its relationship to public safety, the police commissioner also derives his authority from Chapter 291 of the Acts of 1906, as amended by Chapter 322 of the Acts of 1962. The Union maintains that requiring the City to bargain before transferring riot control duties to non-bargaining unit personnel does not intrude upon the non-delegable rights of management.

A public employer may exercise its core managerial prerogative concerning the nature and level of its services without first bargaining with its employees' exclusive collective bargaining representative over that decision. *Newton School Committee v. Labor Relations Commission*, 388 Mass. 557, 563 (1983); *City of Boston*, 31 MLC 25, 31 (2004) and cases cited. "Setting the priorities for the deployment of law enforcement resources is purely a matter of policy" that is exempt from the scope of bargaining defined in Section 6 of the Law. *City of Worcester v. Labor Relations Commission*, 438 Mass. 177, 182 (2002), *citing Burlington v. Labor Relations Commission*, 390 Mass. 157, 164 (1983) (decision to assign prosecutorial duties to town counsel instead of to police prosecutors "is an exclusive managerial prerogative, and not a proper subject of bargaining").

To decide whether a subject properly falls within the scope of bargaining, the Commission balances a public employer's legitimate interests in maintaining its managerial prerogative to effectively govern against the impact on employees' terms and conditions of employment. *Town of Danvers*, 3 MLC at 1571. The Commission applies the balancing test on a case by case basis, considering such factors as the degree to which the subject has direct impact on terms and conditions of employment, and whether the subject involves a core governmental decision or is far removed from em-



ployees' terms and conditions of employment. *Id.* at 1577. Applying the *Danvers* balancing test, the Commission has decided that a public employer's decision to prioritize law enforcement details directly implicates the employer's ability to set its law enforcement priorities and, therefore, it does not constitute a mandatory subject of bargaining. *City of Boston*, 31 MLC at 31, citing, *City of Worcester v. Labor Relations Commission*, 438 Mass. at 184. See also, *City of Newton*, 16 MLC 1036, 1042 (1989) (decision to provide increased fire protection to better preserve property directly involves level of municipal services and is reserved to management); *Town of Dennis*, 12 MLC 1027 (1985) (decision to discontinue providing certain private police details is a level of services decision that lies within management's exclusive prerogative).

The police commissioner's decision to create a special tactical unit is a public safety policy decision that lies outside the scope of mandatory negotiations. The Union does not seek to negotiate over either this decision or the police commissioner's decision to include the police personnel assigned to the DCU and the YVSF in this special tactical unit. Moreover, the Union does not seek to negotiate over the decision to expand riot control work beyond the MOP by assigning riot control work to its unit members who are part of the DCU and YVSF. Rather, the critical issue in this transfer of unit work case is whether the police commissioner's decision to assign riot control work to the non-unit detectives in the DCU and YVSF constitutes a mandatory subject of bargaining.

Applying the *Danvers* balancing test here, we are persuaded that the police commissioner's decision to assign riot control work to all police personnel in the DCU and YVSF, including the non-unit detectives, is a level of services policy decision that is outside the scope of collective bargaining. The record demonstrates that in or about early February 2000, as part of the planning for public safety during the Biotech conference, the police commissioner decided to create a tactical unit and to include the full complement of YVSF and DCU police personnel in this unit. In the police commissioner's opinion, the existing command and operational structure of these two units could be easily translated into a tactical unit. Further, because the YVSF and DCU do not have primary patrol functions, the City could temporarily re-direct the functions of those units to perform crowd and riot control, rather than continuing their assignments unique to their two units.

A critical factor in our decision here is that the police commissioner concurrently decided not to assign unit members from the district stations to perform riot control work, because he did not want to strip those stations of the first responder police officers, whose services, in his judgment, the City continued to need to respond to other public safety needs. The imposition of a duty to negotiate about the assignment of riot control work to non-unit detectives would seriously abridge the police commissioner's inherent managerial prerogative to set public safety priorities for the deployment of police officers, particularly where the City is faced with serious civil unrest that has the potential for turning violent. This is the type of managerial decision that must be reserved to the sole discretion of the City's police commissioner, notwithstanding the fact that this allocation of resources decision transferred some

riot control work previously performed exclusively by unit members to non-unit detectives in the DCU and YVSF. See *City of Worcester v. Labor Relations Commission*, 438 Mass. at 182, quoting *Lynn v. Labor Relations Commission*, 43 Mass. App. Ct. 172, 178 (1997) (the allocation of resources among competing law enforcement priorities "must be reserved to the sole discretion of the public employer so as to preserve the intended role of the governmental agency and its accountability in the political process"). See also, *City of Boston*, 6 MLC 1117 (1979) (decisions to increase the strength of a particular complement of the police department and the decision to transfer officers to that complement are basic policy decisions exempt from collective bargaining).

The police commissioner's decision to transfer some riot control work to non-unit detectives in this case is distinguishable from the decisions to transfer unit work that were at issue in *City of Boston*, 26 MLC at 144, *aff'd sub nom. City of Boston v. Labor Relations Commission*, 58 Mass. App. Ct. at 1102, *fur. rev. den.* 440 Mass. at 1106, and *Town of Saugus*, 29 MLC 208 (2003). In *City of Boston*, the Commission decided that the City's decision to transfer some work of policing the housing developments was not a level of services decision, but a decision about which City law enforcement personnel would perform the work at less cost to the City. Therefore, the Commission properly imposed a bargaining requirement on this economically motivated decision to transfer work out of the Union's bargaining unit. *City of Boston*, 26 MLC at 148, citing *City of Boston*, 6 MLC at 1120-1121 (decision to replace police officers who performed clerical duties with civilian employees who would cost the City less was not a level of services decision). Further, a public employer's decision to transfer the duties of the police mechanic to a civilian employee outside the police officers' bargaining unit is far removed from the heightened direct public safety implications present in the police commissioner's decision at issue in this case. *Town of Saugus*, 29 MLC at 208 (decision to transfer the automotive mechanics' work to non-unit personnel was not a level of services decision exempt from collective bargaining either pursuant to M.G.L. c. 41, Section 97A or pursuant to the general managerial authority vested in police chiefs).

Although the City's decision to transfer a portion of riot control work to non-unit detectives is outside the scope of negotiations, the Law requires the City to negotiate with the Union over the impacts of that decision on employees' terms and conditions of employment. See *City of Worcester v. Labor Relations Commission*, 438 Mass. at 185; *Burlington v. Labor Relations Commission*, 390 Mass. at 164-167; *School Committee of Newton v. Labor Relations Commission*, 388 Mass. at 564. However, a public employer has no obligation to bargain over the impact of a core managerial decision if the only identifiable impact of that decision is a reduction in the employees' ability to perform unscheduled overtime and no other terms or conditions of employment are affected. *Town of West Bridgewater*, 10 MLC 1040, 1046-1047 (1983), *aff'd sub nom. West Bridgewater Police Association v. Labor Relations Commission*, 18 Mass. App. Ct. 550 (1984) (overtime opportunities were not the equivalent of a wage item where the work previously performed by employees on an overtime basis was a by-product of the public employer's staffing patterns and not regularly scheduled); *Town of Billerica*, 8 MLC 1957, 1962-1963

(1982) (the reduction in overtime resulting from decisions to cease filling odd hours and to reduce minimum manning levels did not constitute a mandatory subject of bargaining).

Here, the Union maintains that this transfer of unit work deprived the unit members of the opportunity to perform the work on an overtime basis. This loss of overtime opportunities is in the nature of unscheduled overtime resulting directly from the City's public safety deployment decision and, therefore, does not constitute a term and condition of employment. The record contains no other identifiable impacts on bargaining unit members' terms and conditions of employment. Under the narrow circumstances present in this case, because neither the City's decision to transfer a portion of riot control work to non-unit detectives nor the impact of that decision triggered a statutory bargaining obligation, the City did not violate Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law when it deployed non-unit detectives to provide riot control functions during the Biotech conference, the presidential debate, and the Mayor's state of the City address.<sup>20</sup>

Conclusion

For the reasons stated above, we conclude that the City did not fail to bargain in good faith in violation of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law as alleged in the complaints of prohibited practice. Accordingly, the cases are dismissed.

SO ORDERED.

\* \* \* \* \*

20. Because we have decided that the City had no obligation to bargain over either the decision to transfer a portion of the riot control work to non-unit detectives or the impacts of that decision, it is unnecessary to address the City's other defenses or its Motion to Dismiss.

In the Matter of TOWN OF BOLTON

and

BOLTON DISPATCHERS ASSOCIATION, LOCAL 268A,  
MASSACHUSETTS COALITION OF POLICE, AFL-CIO

Case No. MUP-01-3255

62.3 *discrimination*  
65.2 *concerted activities*  
65.6 *employer speech*

June 27, 2005

Allan W. Drachman, Chairman

Hugh L. Reilly, Commissioner

John M. Becker, Esq.

Representing the Bolton  
Dispatchers Association, Local  
268A, Massachusetts Coalition of  
Police, AFL-CIO

James T. Masteralexis, Esq. Representing the Town of Bolton

**DECISION<sup>1</sup>**

Statement of the Case

The Bolton Dispatchers Association, Local 268A, Massachusetts Coalition of Police, AFL-CIO, (Union) filed a charge of prohibited practice with the Labor Relations Commission (Commission) on December 5, 2001, alleging that the Town of Bolton (Town) had engaged in a prohibited practice within the meaning of Sections 10(a)(1), 10(a)(3), and 10(a)(5) of M.G.L. c. 150E (the Law). Following an investigation, the Commission issued a Complaint of Prohibited Practice on August 15, 2002. The Complaint alleged that the Town had respectively violated Sections 10(a)(1), 10(a)(3), and 10(a)(5) of the Law by: 1) issuing a memorandum that tended to interfere, restrain, and coerce employees in the exercise of their rights under the Law; 2) discriminating against Union members for engaging in concerted, protected activity by issuing oral warning notices for holding a Union meeting; and 3) failing to bargain in good faith by failing to give the Union prior notice and an opportunity to bargain to resolution or impasse over disciplinary procedures.<sup>2</sup> The Town filed an Answer to the Complaint on September 5, 2002.

On October 30, November 6, and 19, 2002, Dianne E. Rosemark, a duly-designated hearing officer (Hearing Officer) of the Commission, conducted a hearing at which all parties had an opportunity to be heard, to examine witnesses, and to introduce evidence. The Union and the Town respectively filed post-hearing briefs on February 20 and 21, 2003. The Hearing Officer issued Recommended Findings of Fact on July 25, 2003. On September 24, 2003, the Un-

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which it shall issue a decision in the first instance.

2. On or about October 25, 2002, the Union withdrew Count III of the Complaint, alleging a violation of Section 10(a)(5) of the Law.